IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.08.2007

CORAM :

THE HONOURABLE MRS.JUSTICE PRABHA SRIDEVAN

A.S.No.477 of 1995

1. R.Chaganlal
   Prop: Sha Maggaji Manoharmal
   Rep. by his Power Agent:
   National Insurance Co. Ltd.

2. National Insurance Co. Ltd.
   Rep. by its Divisional Manager
   and Principal Officer,
   Madras. .. Appellants/Plaintiffs.

-vs-

1. Ceylon Shipping Corporation
   Rep. by their Agents at
   Madras: Sea Shore Shipping
   & Ship Management (P) Ltd.

2. The Board of Trustees of the
   Madras Port Trust, rep. by
   Chairman, Madras-1. .. Respondents/Defendants.

Appeal Suit against the judgment and decree of the learned V Asst. Judge, City Civil Court, Madras, dated 20.4.1993 made in O.S.No.6307 of 1989.

For Appellants : Mr.S.Arunkumar
For Respondents : Mr.K.Bijai Sundar for R-1
: Mr.R.Karthikeyan for R-2

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J U D G M E N T

The plaintiffs are the appellants. The suit was filed for recovery of a sum of Rs.37,670/- towards damages and short delivery of the goods covered by the Bill of Lading No.3 dated 16.10.1988. The suit was dismissed and therefore, this appeal has been filed.

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2. The averments of the plaint in brief are as follows:-

119 cartons of 'Stamping Foils' were packed in two pallets and entrusted with the first defendant under a Bill of Lading for carriage from Bremen to the second defendant Port Trust to be delivered to the first plaintiff. The Vessel arrived at Madras on 4.1.1989. The goods were discharged on 9.1.1989 in a damaged condition and the first plaintiff, by his letter dated 12.1.1989 wanted the first defendant to depute a surveyor to survey the damaged cargo and submit the report. But the first defendant did not arrange for such survey. Since there was no co-operation in this regard, the first plaintiff arranged for his own surveyor, who filed his report on 27.1.1989. By the report, the surveyor assessed the total loss at Rs.37,120/-. Claims were preferred by the plaintiffs on 9.2.1989 and on 15.2.1989. The claims were not settled and therefore, the suit was filed after issuing the statutory notice under Section 120 of the Major Port Trusts Act, 1963.

3. The first defendant, through its agent, filed a written statement stating that the suit is barred for non-joinder of owners of the Vessel. According to them, the seals of the container discharged in the custody of the second defendant were intact at the time of its discharge; that this defendant arranged for the continuous discharge survey by a reputed firm of independant surveyors and therefore, the report would indicate that the seals of the containers were intact. The tally sheet prepared by the second defendant at the time of de-stuffing the cargo from the container would also show that the annotation of the pallets was only superficial in nature. It is in these circumstances that when the first plaintiff made a request for survey, this defendant refused to conduct the survey. Without prejudice to its rights, this defendant also stated that the loss, if any, would have occurred only when the goods were in the custody of the second defendant and therefore, the suit should be dismissed as against the first defendant.

4. The second defendant, which is the Port Trust, filed its written statement denying all the allegations and submitted that since the pallets had been received in a damaged condition, the report of the insurance surveyor appointed by the plaintiffs would not bind this defendant and therefore, their letter dated 15.2.1989 was rightly repudiated by this defendant. The suit consignment was received in a 'Cover Torn' condition. Therefore, there is no negligence, carelessness or want of due diligence on the part of this defendant or its employees. Therefore, the suit is liable to be dismissed.

5. Before the trial Court, the plaintiffs examined P.W.1 and the surveyor as P.W.2 and marked twelve documents. An employee of the second defendant was examined as D.W.1 and three documents were marked.

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6. The learned counsel for the appellants submitted that there is no dispute regarding the export, the date of landing and the date of discharge. Even when the goods were unloaded, there was a noting by the tally clerk that the cover was in a torn condition, as would be seen from the noting 'CT'. Though it is true that the plaintiffs took delivery of the pallets in the cover torn condition, it will be seen from Ex.A-3 that immediately the first plaintiff had made a request for survey of the damaged cargo on 12.1.1989. The defendants indicated their unwillingness to conduct the survey. On 24.1.1989, the plaintiffs cleared the goods from Madras harbour after the survey by the insurance agent and they informed the first defendant that they would send their claim based on the insurance agent's survey report. On 9.2.1989, they again sent a communication to the first defendant, Ex.A-7, enclosing a copy of the survey report. On 15.2.1989, they have also served a notice of claim on the second defendant by Ex.A-8. The notice under Section 120 of the Major Port Trusts Act is Ex.A-9 and the acknowledgment card is Ex.A-10. The reply by the counsel for the second defendant is Ex.A-11. Learned counsel, therefore, would submit that the sequence of events would show that though the plaintiffs took delivery, they had lodged their complaint regarding the pilferage immediately and the fact that they did not object the tally sheet is not relevant since they immediately brought to the notice the fact that there was pilferage. They took delivery only to avoid further pilferage after the survey was conducted. The surveyor's report, which is Ex.A-5, would clearly show that there was pilferage while the goods were in the custody of the second defendant. The learned counsel, therefore, submitted that for the damage that was caused in transit, the first defendant is liable and for the pilferage, the second defendant is liable and the Court below erred in dismissing the suit. The learned counsel relied upon certain judgments to support his case.

7. The learned counsel for the first defendant would submit that the seal was intact when the goods landed at the Madras Port and Sections 42 (2) and 42(7) of the Major Port Trusts Act clearly indicate that the liability of the carrier ends when a receipt is given by the Port Trust for having taken charge of the goods and to support his case, he relied on the judgment of the Andhra Pradesh High Court in **SHIPPING CORPN. OF INDIA v. UNION OF INDIA [A.I.R. 1976 ANDHRA PRADESH 261].**

8. The learned counsel for the second defendant would submit that the surveyor's report would not bind the Port Trust, that the opinion of the surveyor is only based on surmises and there is nothing to indicate where the cargo pilferage took place. The goods had been shifted to the first plaintiff's godown and if any pilferage that had taken place, the second defendant is not liable. The goods had come in a damaged condition and therefore, the liability, if any, is on the first defendant and not the second defendant.

9. The question is whether the plaintiffs are entitled to any amount for the loss sustained by them. The crucial document is Ex.A-5. Ex.A-5 is

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the surveyor's report and it shows that the place of survey was at Bharathi Dock and at consignee's warehouse. The dates of survey are on 13.1.1989 at the Port and on 24.1.1989 at the consignee's warehouse. As regards the nature of packing and external condition of package condition and nature of loss, it states that 5 cartons on one pallet and 2 on the other were found torn open and since 7 cartons were damaged at the Port and since opening of the rolls was not feasible at the Port, the consignees were advised to inform the surveyor on arrival at the warehouse and at the warehouse, the pilferage was actually ascertained and the attributed cause of damage is that "the shortage can only be attributed to pilferage at Madras Port". P.W.2 is the author of Ex.A-5. He has stated in cross-examination that the pilferage had taken place while the goods were with the second defendant. The correctness of this opinion has not been challenged in the cross-examination. In fact, even in the cross-examination of the second defendant, it has been elicited that it is only when the goods were in the second defendant's custody, some one has pilfered the goods. Therefore, this is the evidence which the plaintiffs rely upon for establishing their claim.

10. In **BOND FOOD PRODUCTS PVT. LTD. v. PLANTERS AIRWAYS LTD. [(2006) ACJ 24],** a Division Bench of this Court has considered the evidenciary value of the surveyor's report and in paragraph 14.4, they have referred to the fact that no notice was given to the defendant before appointing the surveyor nor before submitting the report. But, however, the Division Bench relying on the decision of the Madhya Pradesh High Court in **GWALIOR TRANSPORT CO. LTD. v. NATIONAL INSURANCE CO. LTD. [1991 ACJ 811 (MP)],** extracted the following paragraph -

> " The surveyor is an expert in the field of survey and unless there be something positive to discredit him, his assessment has to be accepted. It would have been better if he had assessed the quantum of damages in the presence of the appellant or would have at least noticed the appellant. However, the plaintiff would not be non-suited and the survey conducted by C.P.Sarwahi would not be discarded solely for this reason. A civil case has to be decided on preponderance of probabilities. The goods were delivered from the custody of the carrier to the consignor who was also the consignee and there was nothing which prevented the carrier from employing a surveyor for assessment of damages specially when an open delivery was being insisted upon. The carrier could also have insisted on a survey being conducted in his presence which was not done. In the matter of assessment of partial loss to the goods, some guesswork has to be allowed. The price of the contents of bales is based on the invoices. Discount has been given for the value of the salvage. Primarily, the payment was to be made by the insurance company because the consignor was claiming from it. There is no reason to assume that any extra or unreasonable assessment would have been acceptable to the insurance company."

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and then held that when the defendant carrier failed to employ a surveyor and failed to prove that they have not committed any negligence, the evidence of the surveyor and the report of the surveyor must be accepted.

11. Though it was contended on behalf of the respondents that the decision in **BOND FOOD PRODUCTS PVT. LTD. [(2006) ACJ 24]**, cited supra, arose out of a case where the goods were carried by road and that the liability in that case was under the Carriers Act and that the liability here is under the Carriage by Sea Act, I do not think, on that score, the findings of the Division Bench with regard to the evidenciary value of the surveyor's report is in any way distinguishable. It applies on all fours to the present case.

12. We have already seen that the tally sheet shows that the cover was torn. In this regard, an unreported judgment of a learned single Judge of this Court in Appeal No.518 of 1978 dated 17.11.1982 (between **Trustees of the Port of Madras v. Union of India and another**) has been placed before me. There, a decree for damages was passed against the second defendant alone, the second defendant being the Port Trust. The Port Trust challenged it in appeal. In that case, the annotation on the cargo was 'cover torn with band cut' and it was contended on behalf of the Port Trust that no liability can be fastened on the Port Trust for any pilferage. The learned Judge referred to the following manual instructions to the Traffic Department issued by the Madras Port Trust -

> " Annotation of Packages: - The Port Trust is not liable for any package broken or otherwise damaged before landing. It is therefore vital to note down the condition of the package at the time of landing. To absolve the Trust from any liability for any broken or damaged packages, the Tally Clerks shall carefully note the condition of the package and make an annotation in the following terms against the tally entry."

and held that in view of the instructions issued by the Madras Port Trust, to absolve the second defendant from any liability for any broken packages or any loss of goods, it is necessary that the tallying clerk should carefully note the condition of the package and since the annotation was not "empty", the second defendant cannot escape liability. In that case also, the off-loading of the carton took place two days after landing and at that point, the contents in the cargo were found missing and the learned Judge held that the decree against the Port Trust, second defendant deserves to be confirmed.

13. The Assistant Traffic Manager of the Port Trust has been examined as D.W.1. In his cross examination, he has stated that in Ex.B-1, the noting is 'CT', which means 'Cover Torn'. But, there is no noting that at the time of landing, there was short delivery. A suggestion has been put to him that the container tally has not been filed into Court only because the seal was intact when the goods had landed. He has referred to the container tally and he has also stated that the container tally was not

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broken when the goods landed. If the seal was intact and if the container tally is not produced in Court, we may make the adverse inference that it was not produced in Court only because if the container tally is filed into Court, it would show that at the time of landing, the seal was intact, which would absolve the first defendant of any liability. Then the evidence of D.W.1 would only support the plaintiffs' case. We have already seen that the surveyor's report clearly shows that the pilferage, if any, had taken place only when the goods were in the custody of the Madras Port. When the goods landed there was only a superficial tear in the packages and the seal had been in tact and therefore, if there was any shortfall in the goods, it did not take place while the goods were in transit. The plaintiffs had taken all efforts to have the survey done immediately after they observed that there was pilferage and the surveyor has given his report that the pilferage took place in the Madras Port Trust. In these circumstances, the appeal deserves to be allowed.

14. Accordingly, the judgment and decree of the trial Court are set aside in so far as the second defendant is concerned and the appeal is partly allowed. There shall be a decree as prayed for by the plaintiffs against the second defendant only.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

sra

To
The V Asst. Judge, City Civil Court, Madras.

The Registrar, Civil Civil Court, Madras.

The Section Officer, VR Section, High Court, Madras.

+ 1 CC To Mr. N.Rosi Naidu, Advocate SR NO.50855

+ 1 CC To Mr. Bijai Sundar, Advocate SR NO.50125

+ 1 CC To Mr. Ra.Rajan, Advocate SR NO.50127

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